



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Rulemaking for Adoption of a General  
Order and Procedures to Implement the  
Digital Infrastructure and Video  
Competition Act of 2006.

R. 06-10-005  
(Filed October 5, 2006)

**REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES  
ON COMMISSIONER CHONG'S PROPOSED DECISION RESOLVING  
DIVCA PHASE II ISSUES**

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September 18, 2007

## **I. INTRODUCTION AND SUMMARY**

Pursuant to Rule 14.3 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, the Division of Ratepayer Advocates (DRA) submits these Reply Comments on Commissioner Chong's Proposed Decision (PD) Resolving Phase II Issues in the Digital Infrastructure and Video Competition Act (DIVCA) Rulemaking. For reasons discussed below, the Commission should reject other parties' arguments opposing the PD's proposed low-income and general build-out requirements for the smaller<sup>1</sup> video franchise holders and the additional reporting requirements for video service. DRA urges the Commission to adopt the PD as written, with the modifications set forth herein and in DRA's Opening Comments.

## **II. DISCUSSION**

### **A. Low-Income/Anti-discrimination and General Build-Out Provisions**

Both the Small LECs and SureWest Televideo<sup>2</sup> oppose the PD's proposed requirements that the smaller video service providers *either* comply some of the build-out benchmarks set forth in Public Utilities (PU) Code § 5890 for the larger video franchise holder *or* include in their initial applications for a case-by-case review a "clearly stated build-out milestones" and demonstrate "serious and realistic planning"<sup>3</sup> if they are unable to meet the benchmarks. The Small LECs challenge the "pre-qualification procedure in the Proposed Decision as an improper expansion of the statutory framework outlined in

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<sup>1</sup> By smaller, we are referring to those video franchise applicants or holders with fewer than one million telephone customers within California, consistent with the PD and DIVCA.

<sup>2</sup> Opening Comments of Small LECs on Proposed Decision of Commissioner Chong Resolving Issues in Phase II, Sept. 13, 2007 ("Small LECs Comments") and Opening Comments of SureWest Televideo on Proposed Decision Mailed August 24, 2007, Sept 13, 2007 ("SureWest Comments").

<sup>3</sup> CPUC, Opinion Resolving Issues in Phase II, R.06-10-005, Aug. 24, 2007 (PD) at 35.

DIVCA.”<sup>4</sup> SureWest Televideo claims that the PD “creates an onerous, over-regulatory prior approval application process nowhere contemplated in DIVCA ...”<sup>5</sup>

Contrary to their assertions, the PD, by giving the smaller video franchise applicant the option of setting its own clear build-out milestones when it is unable to meet DIVCA’s build-out benchmarks, establishes a reasonable standard which gives the smaller applicant the opportunity to create its own benchmarks tailored to local demographic and video infrastructure cost conditions. The smaller applicant can combine the PD’s provisions for adjusting the local socioeconomic characteristics of its service area<sup>6</sup> with the provisions for delineating higher cost areas.<sup>7</sup> At the same time, the milestones provide a yardstick for good-faith build-out efforts on the part of the smaller franchisee. Thus, the PD’s proposed case-by-case review mechanism is reasonable because it affords the smaller service providers with an alternative safe harbor to the benchmarks set forth in § 5890.

The Small LECs also oppose the PD’s proposed benchmarks for the low-income/non-discrimination build-outs set forth in § 5890(b) when the number of low-income households in a service provider’s area is relatively low. They propose a scenario in which they would be unable to provide a proportional number of low-income customers with video access, if some of those customers lived in remote, high-cost areas.<sup>8</sup> This scenario, however, overlooks the fact that such high-cost areas could be eliminated from the required service area, if justified, during the preliminary build-out planning process of the PD. Additionally, the smaller service providers can also apply for a case-by-case review if they are unable to meet the DIVCA benchmarks.

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<sup>4</sup> Small LECs Comments at 7.

<sup>5</sup> SureWest Comments at 1.

<sup>6</sup> PD at 15-16.

<sup>7</sup> *Id.* at 18.

<sup>8</sup> Small LECs Comments at 6.

## **B. Additional Reporting Requirements**

Both AT&T and Verizon oppose the addition of video subscriber data as part of the DIVCA reporting requirements of General Order (GO) 169. They assert that this requirement is not statutorily supported under DIVCA and that the data is proprietary. Their assertions are without merit.

The PD correctly notes that the Commission has “. . . authority to take actions necessary for our [Commission] enforcement of specific DIVCA provisions.”<sup>9</sup> In Decision 07-03-014, the Commission noted that “the Legislature intended for DIVCA to ‘[c]omplement efforts to . . . close the digital divide,’ and possessing broadband and video data also will enable us to support a variety of voluntary efforts to increase broadband adoption.”<sup>10</sup> In the same decision, the Commission concluded that “. . . this authority extends to our [Commission] ability to impose additional reporting requirements.”<sup>11</sup> DRA agrees with the PD that both the legislative intent and the DIVCA statutory language support expanding the reporting requirements to include video service subscriber data.

Further, since the subscriber data for broadband service is already required under GO 169, it is sensible to get the same data for video service. As noted by the Legislature above, broadband and video services are inextricably linked and thus, the same type of data should be required for both services. Additionally, subscriber data for video service will be useful for the Commission in validating and determining whether the service providers are complying with the anti-discrimination and build- out requirements of PU Code § 5890 in a meaningful way. The data will also allow the Commission to determine and address any video access gaps and low usage rates in a timely manner. Lastly, the data will also provide DRA with an additional tool to fulfill its statutory duties. Under

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<sup>9</sup> PD at 19 citing D. 07-03-014, *mimeo*, at pp. 145-146.

<sup>10</sup> D. 07-03-014, *mimeo*, at p. 141.

<sup>11</sup> *Id.*

DIVCA, DRA is charged with the duty to advocate on behalf of video customers, which include enforcing the non-discrimination and build-out provisions of § 5890.

AT&T and Verizon also oppose the additional reporting requirements on the grounds that the video service subscriber data contains proprietary information. This argument also lacks merit.<sup>12</sup> The PD already provides a solution that will ensure that competitively sensitive data is properly protected. The PD states that “to the extent that franchise holders asserts that this is [video subscriber data] is competitively sensitive information, we reiterate that under Section 5960(d), we may provide confidential treatment of this information.”<sup>13</sup> Thus, the PD as written, will ensure that any information that is indeed proprietary, will be adequately protected from public disclosure.

### **C. Public/Community Meetings**

In our Opening Comments, DRA recommended that the Commission include public/community meetings as part of the case-by-case review process for the smaller service providers. DRA herein notes that PU Code § 5890(f)(2) already specifies the need for public hearings when franchise holders seek extensions of “reasonable time” to comply with DIVCA’s build-out benchmarks after two years. Section 5890(f)(2) requires the Commission to hold public hearings as follows:

Upon application [for an extension to meet the requirements of subdivision (b), (c), or (e), the franchising authority shall hold public hearings in the telephone service area of the application.

DRA believes the flexibilities provided with respect to build-out timelines, high-cost areas, and low-income areas should be considered together as part of the build-out planning process. A less formal public meeting process for ironing out the complexities of providing video service in smaller service areas seems the easiest way to lay out clear

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<sup>12</sup> Verizon Comments at 5; AT&T Comments at 5.

<sup>13</sup> PD at 25.

milestones or benchmarks at the inception in a two-way process that respects both franchise applicant needs and those of the local customers.

### **III. CONCLUSION**

DRA urges the Commission to adopt the PD as written, with the modifications described herein and in DRA's Opening Comments. The Commission should also adopt the attached proposed findings of fact and conclusions of law.

Respectfully submitted,

/s/ Cindy J. Yun

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**DRA's Recommended Additions to the PD's Findings of Fact and  
Conclusions of Law**

**Findings of Fact**

1. The case-by-case compliance review for a high cost exemption for a smaller video franchise holder shall include public/community meetings.
2. The case-by-case compliance review for an extension of time to comply with the low-income and general build-out requirements for a smaller video franchise holder shall also include public/community meetings if the holder fails to meet its promised build-out timelines set forth in the application.

**Conclusions of Law**

1. Pub. Util. Code § 5890(f)(2) requires the franchising authority to hold public hearings in the telephone service area when a video service provider applies to the state franchising authority for an extension to meet the requirements of subdivision (b), (c) or (e).

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of **“REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON COMMISSIONER CHONG’S PROPOSED DECISION RESOLVING DIVCA PHASE II ISSUES”** in **R.06-10-005** by using the following service:

[ X ] **E-Mail Service:** sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses.

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Dated at San Francisco, California this **18th** day of **September, 2007**.

/s/ Imelda C. Eusebio

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**N O T I C E**

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